No. 15184

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JACQUES DE GORTER and SUZE C. DE GORTER, as individuals and as copartners trading as PELTA FURS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review of an Order to Cease and Desist.

PETITIONERS' REPLY BRIEF.

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I.

Contested Issues.

Respondent's contention, that Points III and IV contained in Petitioners' Brief on Review present issues not raised in petitioners' appeal to the Federal Trade Commission, is not supported by the record, and is a misstatement of fact.

Petitioners' Statement of Points to Be Raised on Appeal on this review apprised respondent of the fact that these points would be raised. Respondent should have asked for inclusion, in the transcript of the record, of Petitioners' Brief on Appeal (Resp. Br. on appeal below) to support this position.

The fact that the respondent Commission did not, in its opinion in support of its Cease and Desist Order, or in the Order itself, make findings of fact or draw conclusions of law touching upon these points, does not indicate that the issues were not presented to it on the appeal below.

In petitioners' brief on appeal below (Resp. Br. on Appeal, argument 2, pp. 16-20) they argued at some length that the complaint charged that petitioners violated the provisions of the Fur Act and its rules and regulations, and that the violation of this Act and its rules constituted unfair acts and practices and unfair competition under the Federal Trade Commission Act, which latter Act was by reference made a part of the Fur Act in order to justify the issuance of a Cease and Desist Order, as distinguished from the imposition of a criminal penalty of fine or imprisonment.

Petitioners further argued therein that they did not believe that respondent Commission had authority to issue a complaint charging unfair acts and practices and unfair methods of competition in interstate commerce under the Federal Trade Commission Act, without having first promulgated rules condemning such acts and practices.

Respondent Commission may have seen fit not to pass upon these issues in view of its conclusion that Rule 44 of the Fur Act was properly promulgated which conclusion rendered unnecessary of determination the two issues referred to herein.

II.
Argument.

The preliminary statement in respondent's brief requires little comment. Petitioners have no argument with the principles of law enunciated therein and which this court is admonished to heed in determining the issues and reviewing the evidence.

Petitioners request this court to exercise only the powers which it has and which are referred to in the preliminary statement. This court is requested (1) to determine the statutory authority of the Federal Trade Commission to promulgate Rule 44 of the Fur Act; (2) to determine the intent and meaning of the provisions of the Act in the light of constitutional limitations on the authority of Congress to enact it, and (3) to determine whether there is substantial evidence, under the material allegations of the complaint, to support the findings and conclusions made by respondent Commission which would justify its Cease and Desist Order.

Petitioners' reply to respondent's brief will be brief in view of the fact that petitioners anticipated the contentions and arguments of respondent from a consideration of the respondent's briefs filed in the hearing below.

1. Petitioners Are Not Engaged in Interstate Commerce in the Sale and Distribution of Their Fur Products.

For the purpose of the argument, petitioners admit that they violated certain provisions of the Fur Act and its rules and regulations and take no issue with respondent on that score.

Petitioners in their opening brief took the position that the shipment (not the sale) in interstate commerce of 7

fur products in 1063 separate sales and deliveries of fur products, all made in intrastate transactions during a four months period of operation, does not constitute *a course of trade in interstate commerce.* Assuming that this court is disposed to accept this contention, petitioners then claim that none of their other business practices, (1) constitute the doing of business in interstate commerce, or (2) substantially affect interstate commerce carried on by others. The ensuing arguments are intended to demonstrate the merit of this position.

Since petitioners do not sell or ship or transport "fur products" in interstate channels (with the exception of the isolated shipments above referred to), and since they do not manufacture for sale, shipment or transportation or introduction into interstate commerce of "furs," the only business practices of petitioners which might result in their being engaged in interstate commerce, or which might result in substantially affecting interstate commerce, are:

(a) The advertising of their "fur products" in newspapers of interstate circulation;

(b) The advertising, manufacture for sale, sale, transportation or distribution in purely intrastate transactions of "fur products" made of *"furs" which have been shipped and received in commerce.*

Respondent contends that insofar as it is relevant here, Section 3(a) provides, "that the advertising in interstate commerce, etc." (Resp. Br. p. 18); petitioners submit that insofar as it is relevant here, Section 3(a) provides as follows: "the advertising or offering *for sale* in commerce."

Respondent contends that the court cannot pick and choose bits of the evidence to justify the drawing of differ-

ent *findings of fact and conclusions of law,* and yet respondent picks language in a statute out of context to prove that what it concludes was the intention of the Congress in the passage of the Act.

Petitioners submit that they are not engaged in a play on words, but earnestly contend that under rules of statutory construction the words in a statute must be read in conjunction with the other words therein in order to arrive at the correct legislative intent and this is particularly true where the legislation is subject to constitutional limitations and as those statutes are interpreted and impressed with decisions of the Federal courts. And this is especially true where the Congress legislates respecting the commerce clause.

Petitioners earnestly urge that it is not the mere fact of advertising in interstate commerce that brings fur merchants within the purview of the Fur Act, but rather it is the *advertising for sale in commerce* which has that effect, and such was the intention of the Congress in the use of the language "the advertising or offering for sale in commerce."

Respondent contends that petitioners appear to be attacking the constitutionality of the Fur Act and that they therefore have the burden of establishing its unconstitutionality. Petitioners are not attacking the validity of the Fur Act; they are attacking the attempt on the part of respondent Commission to apply the Act in an unconstitutional manner by a misinterpretation of its clear and unambiguous language, and by a disregard of the limitations imposed upon the Congress by decisions of the Federal Courts limiting the extent to which Congress may legis-

late under the Commerce clause. Respondent admits that its conclusion that petitioners are engaged in interstate commerce is based solely upon, and we quote, "(1) petitioner's interstate advertisements of a fur product" (Resp. Br. p. 19). Obviously its conclusion is not based upon a finding that petitioners *advertised for sale in commerce,* but, merely that they advertised.

The foregoing conclusion is not justified either on the ground (1) that petitioners are engaged in interstate commerce under the language of the Act, or (2) upon the ground that the mere fact of advertising substantially affects interstate commerce. To constitute an engagement in interstate commerce there must exist more than just the fact of advertising in a newspaper of interstate circulation. There must be an attempt *to engage in interstate commerce* through the medium of interstate advertising. In the instant case there is no evidence in the record of an engagement in interstate commerce, and certainly the mere fact of advertising, in a newspaper of interstate circulation, cannot be said to have an effect upon interstate commerce.

The cases cited by respondent, in support of its contention, that Congress' right to legislate over purely intrastate transactions, exists whenever these purely intrastate activities affect interstate commerce, have no application to the facts of the instant case.

Respondent in its brief at page 28 refers to numerous cases and examples indicating Congress' authority to legislate over purely intrastate transactions. Respondent says, "Familiar examples are the Congressional power over commodities *inextricably commingled, some of which are*

moving interstate and intrastate." The cases and examples as indicated in its brief involve, railroad car appliances, sales of milk, sales of tobacco, all commingled in both interstate and intrastate movement.

Labor relations, market transactions and corporate financial practices are subject to Congressional legislation, "once it is established that the evil concerns or affects commerce in more states than one" (Resp. Br. pp. 30-31).

How can it be said with any merit that the mere fact of advertising of a "fur product" in a newspaper of interstate circulation, which fur product is subsequently sold in a purely intrastate transaction, has the tendency or ability to "affect commerce in more states than one" or that such "fur product" so advertised is, "inextricably commingled with other fur products which are in interstate commerce or moving in interstate channels"?

The other business practices engaged in by petitioners, which might submit them to the jurisdiction of the Federal Trade Commission under the Fur Act, are the sale, advertising, transportation and distribution of "fur products" in purely intrastate transactions. However, the jurisdiction of the Commission can only extend to these business practices if the "fur product" is made of *"furs" which have been shipped and received in commerce.*

Petitioners in their opening brief argue that the Congress intended to extend the coverage of the Fur Act as far as it was constitutionally able to do, but since the authority of the Congress to legislate, with respect to the commerce clause, is limited by the "goods come to rest" principle laid down by the courts, it could not provide that a *"fur product" shipped and received in commerce* con-

tinued to be subject to Federal regulation after receipt and commingling with other goods in the state of its destination.

For this reason, petitioners argued, Congress provided that "fur products" which were made of *furs which had been shipped and received in commerce,* continue to be a subject of interstate commerce even after arrival and commingling at its destination.

Respondent Commission, in its attempt to disparage this argument and reasoning, refers to statements made by various proponents of the measure while it was before the Congress for consideration. Petitioners submit that the interpretation of the language of Congressional or any legislation, which may be given it by its sponsors and proponents cannot, under our system of separation of powers, deprive the court of its authority to place a different interpretation upon the language or to apply the legislation in a constitutional manner so long as such interpretation and application do not do violence to the language of the Statute.

The statements of proponents of the Fur Act do not lend as much support to respondent's position as respondent would have this court believe. The statement made by Senator Lodge (Resp. Br. p. 24) indicates that he sought to delete from the pending legislation certain language which gave the Federal Trade Commission too much control and which affected the fur merchant too adversely. In the quotation contained in respondents brief, Senator Lodge indicates that the proposed amendment to the original bill would not weaken the protection to the consumer and would afford the retailer an important right.

The statement, made by Representative O'Hara (Resp. Br. p. 25), recognizes the limitations surrounding Congress' right to legislate concerning interstate commerce, yet, respondent argues, that Congress has unlimited power to legislate over the commerce clause (Resp. Br. p. 36). Such pronouncements made by respondent as, and we quote,

> "the power can be exercised, as it has in this case, to protect the public from unfair methods of competition . . . in interstate commerce or intrastate commerce. The method selected by Congress to effect this purpose is a matter of legislative discretion not subject to attack if reasonably related to the end sought" (Resp. Br. p. 36).

are not supported by the cases cited in its brief. Those cases sanction the right of Congress to legislate respecting intrastate transactions if they are so commingled with interstate ones as to affect commerce or if they otherwise substantially affect interstate commerce.

Respondent Commission leans heavily upon the decision of the Supreme Court in *United States v. Sullivan,* in support of its contention that Congress may control purely intrastate transactions without any qualifications (Resp. Br. pp. 33-36).

Three things stand out in the facts and decision of the *Sullivan* case which distinguish it from the instant case. First, and perhaps least important, is the fact that the case involves the Food and Drug Act which controls the sale and distribution of products dangerous for human consumption if improperly branded. Second, the decision of the Court of Appeals was disaffirmed by the Supreme

Court on the ground that the Court of Appeals narrowly interpreted the language of the Act in order to avoid determining the Act's constitutionality. The Court of Appeals so construed the Act as to do violence to its clear and unambiguous language in order not to hold that the Act was unconstitutional. The language of the decision of the Supreme Court quoted in respondent's brief at page 33, so indicates.

The reversal of the judgment of conviction of the defendant by the Court of Appeals, was undoubtedly due to this error on the part of the latter court. We quote a portion of the opinion of the Supreme Court in that case,

> "where it is reasonably plain that Congress meant its Act to prohibit certain conduct, no one of the above references justifies a distortion of the Congressional purpose, not even if the clearly indicated purpose makes marked deviation from custom or leads inevitably to a holding of unconstitutionality."

More important, however, is the third distinction between the facts of that case and the facts of the instant case. Petitioners have argued here, that the "goods come to rest principle," prevents Congress from including as a part of interstate commerce goods which have arrived at their destination and have become commingled with similar goods, unless those goods come within the exception to the rule that if such goods, upon arrival at the point of destination, are to be manufactured or otherwise processed before sale, they are still a part of interstate commerce.

Petitioners now point out that "fur products" do not come within the exception to the rule for the reason that upon arrival in the state of destination, nothing remains to be done to them before their sale in intrastate com-

merce. However, with respect to "furs," which are to be manufactured into "fur products," something further must be done to them before they are to be sold in intrastate commerce, and they are therefore still in interstate channels, since under the exception to the rule, they have not come to rest.

In the *Sullivan* case, the drug was received at its ultimate destination by the consignee in bottles containing 1,000 tablets, which bottles bore labels placed thereon by the shipper. The consignee, however, did not sell the drugs in the bottles, but he removed the tablets from the bottles and placed them in pill boxes prior to sale, which pill boxes were labeled differently from the bottles in which he received them. Since the drugs, after receipt by the consignee had to be processed by him before their sale in purely intrastate transactions, they could be considered as not having come to rest, and therefore still in interstate commerce.

Section 301(k) of the Food, Drug and Cosmetics Act *prohibits the doing of any act with respect to a drug* if such act is done while such article is held for sale after shipment in interstate commerce. We quote the following portion of the opinion of the Supreme Court in the *Sullivan* case:

> "In order to extend protection of consumers contemplated by the law to the full extent constitutionally possible, paragraph (k) has been inserted . . ." (Resp. Br. p. 35).

It is petitioners' contention that the Congress intended to accomplish by Section 3(a) of the Fur Act what it sought to accomplish in Section 301(k) of the Food, Drug

and Cosmetics Act. The intention was to include in the coverage of the Act those products which, after receipt by the consignee for sale in purely intrastate transactions, required some processing before such sale, so as to come within the exception to the rule.

2. Rule 44 of the Rules and Regulations Under the Fur Products Labeling Act Is Not Within the Rule Making Authority Conferred Upon the Commission by the Act.

Petitioners have fully covered this point in their opening brief (Pet. Br. pp. 22-28), and for that reason feel it unnecessary to belabor the point at length.

Respondent refers to the opinion in the *Higginbothom* case, cited by petitioners in their opening brief, in support of its contention that the principle *"ejusdem generis"* has no application here.

Petitioners submit that the language contained in Section 5(a)(5) is *clear and free from doubt* and comes within the rule enunciated in that case and as quoted by respondent in its brief (Resp. Br. p. 43).

Subdivision (5) of Section 5(a) does not represent an independent thought disconnected from any of the other subdivisions of that Section. Subdivision (1) of Section 5(a) is definitely tied in with Subdivision (5). Subdivision (1) provides that advertising is false if it does not show the name of the animal producing the fur, while Subdivision (5) provides that the advertisement shall not show the name of any animal other than the animals specified in Subdivision (1). What the two subdivisions are intended to accomplish is to cause affected persons in advertising fur products or furs, to use the names of the

animals as they appear in the Fur Guide and to use none others.

Respondent again refers to statements made by sponsors and proponents of the Fur Act as indicating that the Act was intended to be a pricing act as well as a labeling act. The statements so referred to in no wise refer to pricing.

The only statements referred to in respondent's brief which have any reference to pricing are statements made by counsel for the Master Furriers' Guild who questions whether any legislation relative to pricing was necessary in view of the fact that in his opinion the Federal Trade Commission Act already covered the subject (Resp. Br. pp. 48-49). The only other statement relating to pricing is that made by a representative of respondent Commission, but respondent Commission's attitude with respect to required legislation does not reflect the intention of the Congress in its statutory enactments.

If, as respondent Commission claims, the Congress had before it, prior to its enactment of the Fur Products Labeling Act, evidence of pricing abuses committed by wholesalers and retailers in the fur business, the fact that the Act does not mention pricing in any respect, indicates that the Congress had no intention of legislating with respect to pricing insofar as the fur industry is concerned.

Respectfully submitted,

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